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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier	:	
Power Company 270 MW Coal-Fired	:	MOTION FOR SUMMARY
Power Plant, Sevier County	:	JUDGMENT AND
Project Code: N2529-001	:	MEMORANDUM IN SUPPORT
DAQE-AN2529001-04	:	OF MOTION

The Utah Chapter of the Sierra Club (Sierra Club) respectfully moves for Summary Judgment on the claim in Statement of Reasons # 10 of its First Amended Request for Agency Action,[1] and for an order by the Air Quality Board (Board) remanding the Approval Order (AO) for the proposed plant to the Division of Air Quality and the Executive Secretary (collectively "DAQ") for further proceedings. In support of its motion, Sierra Club submits the following memorandum, together with the attached exhibits.

[1] Sierra Club submitted a motion to amend its request for agency action on February 16, 2007 after the production of the administrative record. Because the stipulated schedule approved by the Board requires that the first round of dispositive motions be filed by February 26, 2007, Sierra Club submits this motion for summary judgment in anticipation that the Board will grant the motion to amend the request for agency action.

Introduction

The Sierra Club moves for summary judgment on one claim, which requires an immediate remand of the AO to the DAQ for further proceedings. As specified in Statement of Reasons # 10, the Board must remand the AO because, under the applicable regulations, the AO is now invalid because more than 18 months have passed since DAQ issued the AO without Sevier Power Company (SPC) beginning construction on the project. Sierra Club respectfully requests that the Board grant summary judgment on this claim and remand the AO to DAQ to re-initiate the approval process.

Legal Standards

Summary Judgment

The Utah Administrative Procedures Act allows the Board to decide issues in this administrative appeal on a motion for summary judgment if the moving party meets the requirements of Rule 56 of the Utah Rules of Civil Procedure.[2] Under Rule 56(c), summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3] Because summary judgment will cut off any discovery and the presentation of expert testimony, the Board must "examine all of the facts presented and the inferences to be drawn therefrom in the light most favorable to the nonmoving party."[4] The first question the Board must answer is whether there are any disputed issues of fact regarding the claim or claims on which a party is moving for

[2] Utah Code Ann. § 63-46b-1(4)(b).
[3] Utah R. Civ. P. 56(c).
[4] Grynberg v. Questar Pipeline Company, 2003 UT 8, ¶ 20, 70 P.3d 1 (2003).

judgment. If there are no disputed factual issues, the Board must then decide – based on the undisputed facts – whether the party that filed the motion should get judgment as a matter of law.

The purpose of a summary judgment motion is not "to judge the credibility of the averments of the parties, or witnesses, or the weight of the evidence,"[5] but rather the purpose is to avoid a trial on an issue when, even viewing the facts in the light most favorable to the non-moving party, the non-moving party cannot prevail.[6] The Sierra Club submits this motion for summary judgment based on the pleadings in this matter, the Administrative Record, and the exhibits attached to this memorandum. Because the facts related to Sierra Club's motion are undisputed in the record, the Board can address the second summary judgment question: whether the Sierra Club is entitled to judgment as a matter of law. Based on the applicable regulations and the provisions of the AO itself, the Sierra Club is entitled to judgment as a matter of law on the claim in Statement of Reasons # 10 that the AO has expired by operation of law.

Standard for Review of Legal Issues and DAQ's Decisions

Under the Utah Administrative Procedures Act (UAPA), the Board makes findings of fact and conclusions of law regarding the issues raised in a request for agency action.[7] As the Utah Supreme Court has noted, the Board is "vested with adjudicative

[5] W.M. Barnes Co. v. Sohio Natural Res. Co., 627 P.2d 56, 59 (Utah 1981) (citation omitted).
[6] Draper City v. Estate of Bernardo, 888 P.2d 1097, 1101 (Utah 1995).
[7] Utah Code Ann. § 63-46b-10(1)(a)-(d) ("… the presiding officer shall sign and issue an order that includes: (a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted; (b) a statement of the presiding officer's conclusions of law; (c) a statement of the reasons for the presiding officer's decision; (d) a statement of any relief ordered by the agency").

functions,"[8] and sits in the same position with respect to the DAQ as a reviewing court sits with respect to a final action by an agency. The adjudicative nature of this proceeding requires the Board to apply the review provisions listed in the UAPA when reviewing DAQ decisions: the Board should grant relief if "it determines that a person seeking judicial review has been substantially prejudiced by" any of twelve deficiencies in the action the Board is reviewing.[9] Under the UAPA, a party is substantially prejudiced if "the agency has erroneously interpreted or applied the law," or if "the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedures," or if "the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence," or if "the agency action is … contrary to a rule of the agency … contrary to the agency's prior

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[8] Utah Chapter of the Sierra Club v. Air Quality Bd., 2006 UT 74, ¶ 12, 148 P.3d 960.

[9] Utah Code Ann. § 63-46b-16(4). This section provides, in full, that

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
(b) the agency has acted beyond the jurisdiction conferred by any statute;
(c) the agency has not decided all of the issues requiring resolution;
(d) the agency has erroneously interpreted or applied the law;
(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
(h) the agency action is:
(i) an abuse of the discretion delegated to the agency by statute;
(ii) contrary to a rule of the agency;
(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
(iv) otherwise arbitrary or capricious.

practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or …otherwise arbitrary or capricious."[10]

Under the Utah Air Conservation Act, the Board has the power to "hold hearings relating to any aspect of or matter in the administration of this chapter" and "issue orders necessary to enforce the provisions of this chapter."[11] By contrast, the power conferred by the Legislature on the Executive Secretary is subject to the Board's superior authority: "as authorized by the board subject to the provisions of this chapter, [the Executive Secretary may] enforce rules through the issuance of orders, including: … (ii) requiring the construction of new control facilities or any parts of new control facilities or the modification, extension, or alteration of existing control facilities or any parts of new control facilities."[12] Because the Utah Air Conservation Act specifies that the Board has the ultimate decision-making power within the Division of Air Quality, the Board must review the Executive Secretary's decisions without deference, and the Board is required under the UAPA make its own, independent findings of fact and conclusions of law regarding the issues raised in a request for agency action.[13]

[10] Utah Code Ann. §§ 63-46b-16(4)(d), (e), (g), (h).
[11] Utah Code Ann. § 19-2-104(3)(a)-(b).
[12] Utah Code Ann. § 19-2-107(2)(g)(2).
[13] Utah Code Ann. § 63-46b-10(1)(a)-(d) ("… the presiding officer shall sign and issue an order that includes: (a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted; (b) a statement of the presiding officer's conclusions of law; (c) a statement of the reasons for the presiding officer's decision; (d) a statement of any relief ordered by the agency").

Statement of Undisputed Material Facts

1. On October 12, 2004, Richard W. Sprott, Executive Secretary of the Utah Air Quality Board, signed an AO authorizing construction and operation of the proposed Sevier Power Company 270 MW circulating fluidized bed (CFB) coal-fired power plant (DAQE-AN2529001-04) (Project Code: N2529-001). Exhibit 1 (Approval Order) at Cover Letter, AR SPC 2531.[14]

2. Condition No. 9 of the AO provided that "If construction and/or installation has not been completed within eighteen months from the date of this AO, the Executive Secretary shall be notified in writing on the status of the construction and/or installation. At that time, the Executive Secretary shall require documentation of the continuous construction and/or installation of the operation and may revoke the AO in accordance with R307-401-11." Exhibit 1 at 5, AR SPC 2535.

3. Eighteen months after the date of the AO – on or about April 12, 2005 – SPC did not submit the required notification of the status of construction. See Exhibit 2 (Final Preliminary Index to the Administrative Record).

4. Eighteen months after the date of the AO – on or about April 12, 2006 – the Executive Secretary made no determination regarding a revocation of the AO, nor whether an extension of the AO was justified. See Exhibit 2 (Final Preliminary Index to the Administrative Record).

Argument

[14] Citations to the "AR" are to the Administrative Record in this matter. In addition to selections from the Administrative Record attached as exhibits to this motion, Sierra Club will provide copies of the cited documents to the Board upon request.

1. The Approval Order for SPC's Proposed Plant is Invalid and the Board Must Remand the AO to DAQ Because 18 Months Have Passed Since Approval Without Commencement of Construction and Without Reevaluation and Extension by the Executive Secretary (Statement of Reasons # 10)

The AO for the proposed SPC power plant must be remanded to the DAQ because the AO is no longer valid under Utah and federal regulations and by the terms of the AO itself. The applicable regulations provide that an AO to construct a source "shall become invalid if construction if not commenced within 18 months after receipt of such approval."[15] This federal regulation has been in effect since at least 1975,[16] and is incorporated into the Utah air quality regulations by Utah Administrative Code R307-405-19(1).[17]

Although the regulation also provides that the agency "may extend the 18-month period upon a satisfactory showing that an extension is justified,"[18] the Administrative Record in this matter shows that, after 18 months – on or about April 12, 2006 – SPC did not offer any showing that an extension was justified, nor did the Executive Secretary extend the 18-month period before that period ended.[19] Nowhere in the Administrative

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[15] 40 C.F.R. § 52.21(r)(2); Utah Admin. Code R307-405-19(1).

[16] See Grand Canyon Trust v. Tucson Elec. Power Co., 391 F.3d 979, 982 n.1 (9th Cir. 2004).

[17] This regulation, listed under "Source Obligations" in the Prevention of Significant Deterioration regulations, provides that "the provisions of 40 C.F.R. 52.21(r), effective March 3, 2003, are hereby incorporated by reference." Utah Admin. Code R307-405-19(1). The permittee is also bound by these regulations by the provisions in the AO itself, which provides that "[t]his AO in no way releases the owner or operator from any liability for compliance with all other applicable federal, state, and local regulations including R307." Exhibit 1 at 12, AR SPC 2542.

[18] 40 C.F.R. § 52.21(r)(2), incorporated by reference in Utah Admin. Code R307-405-19(1).

[19] See Exhibit 2 (Final Preliminary Index to the Administrative Record). The Administrative Record contains no documents dated after October 12, 2004. Id. at 4. April 12, 2006 – 18 months after the date of the AO – falls well beyond the date of that last document.

Record does it show that construction has begun on the proposed power plant.[20] Indeed, although Condition 9 of the AO specifically provides that "[i]f construction and/or installation has not been completed within eighteen months from the date of this AO, the Executive Secretary shall be notified in writing on the status of the construction and/or installation," the Administrative Record shows that SPC did not provide the required notification.[21]

Two federal courts that have considered the federal regulation incorporated in R307-405-19(1) have concluded that a permit "automatically expires" when 18 months pass from the approval of the permit without commencement of construction.[22] Specifically, the Ninth Circuit Court of Appeals found that

> a permit automatically becomes invalid in the enumerated circumstances unless the administrator exercises discretionary authority to extend the permit. On a natural reading of the language, administrative action is only required to forestall invalidation of a permit. No agency action is required to invalidate a permit if construction is not timely commenced.[23]

It is undisputed that the Executive Secretary did not extend the permit within the 18-month period required under the regulations. This automatic expiration is significant, because – notwithstanding there has been no stay of the AO since October 12, 2004 – it means that the AO to construct the proposed plant is now invalid, and has been since April 12, 2006. Any application to construct the proposed plant must be presented to the DAQ for consideration under current circumstances, subject to today's laws and

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[20] See id.
[21] Exhibit 1 at 5, AR SPC 2535; see Exhibit 2 (Final Preliminary Index to the Administrative Record).
[22] Grand Canyon Trust, 391 F.3d at 981 & 982 n.1; Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1034, 1037 (1st Cir. 1982).
[23] Grand Canyon Trust, 391 F.3d at 981.

regulations.[24] Because the AO is now invalid, SPC must submit an updated Notice of Intent to DAQ and re-initiate the AO process to obtain approval to construct its proposed plant. Because the AO is invalid, the Board must remand this matter to DAQ and require SPC to re-submit the Notice of Intent, with whatever modifications SPC considers warranted by current factual and legal circumstances.

Furthermore, remand to the DAQ is necessary for re-consideration of the terms and conditions of the AO because the Executive Secretary did not make a determination, after 18 months, of whether changed circumstances required him to revoke the AO at that time. The AO and the DAQ regulations both provide expressly for Executive Secretary review 18 months after the AO is issued.[25] The 18-month review is mandatory under the regulations: "[a]pproval orders issued by the executive secretary in accordance with the provisions of R307-401 shall be reviewed eighteen months after the date of issuance to determine the status of construction …. If a continuous program of construction … is not proceeding, the executive secretary may revoke the approval order."[26]

The Administrative Record reflects that SPC did not notify the Executive Secretary of the status of the project as required under the terms of the permit, and that the Executive Secretary did not conduct the review required by regulation in April 2006.[27] This absence of this mandatory review prevented the Executive Secretary from

[24] See Roosevelt Campobello, 684 F.2d at 1039.
[25] Exhibit 1 at 5, AR SPC 2535 ("If construction and/or installation has not been completed within eighteen months from the date of this AO, the Executive Secretary shall be notified in writing on the status of the construction and/or installation. At that time, the Executive Secretary shall require documentation of the continuous construction and/or installation of the operation and may revoke the AO in accordance with R307-401-11."); see also Utah Admin. Code R307-401-18 (formerly R307-401-11).
[26] Utah Admin. Code R307-401-18 (emphasis added).
[27] See Exhibit 2 (Final Preliminary Index to the Administrative Record).

assessing whether any changed circumstances warranted revocation of the AO after the eighteen months during which construction had not begun. Because the AO automatically expired in April 2006, and because the Executive Secretary failed to conduct the mandatory 18-month review required under the regulations and permit conditions, the Board must grant summary judgment on the claim in Statement of Reasons # 10 and remand this matter to the DAQ for SPC to submit a revised Notice of Intent to DAQ, based on current circumstances and conditions, to obtain approval to construct the proposed plant.

Dated: February 26, 2007

___/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February 2007, I caused a copy of the foregoing Motion for Summary Judgment and Memorandum in Support of Motion to be emailed to the following:

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